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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ELIAS GUTIERREZ,

Defendant and Appellant.

H045606

(Santa Clara County

Super. Ct. No. B1582501)

I. INTRODUCTION

Defendant Jose Elias Gutierrez was convicted after jury trial of two counts of aggravated sexual assault of a child under 14 (Penal Code, § 269).¹ The trial court sentenced defendant to prison for 30 years to life. Defendant was also ordered to pay various fines and assessments.

On appeal, defendant contends that, based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court violated his due process rights under the California and federal Constitutions by failing to make an ability-to-pay determination before imposing the fines and assessments.

For reasons that we will explain, we will affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

II. BACKGROUND

In 2017, defendant was convicted by jury of two counts of aggravated sexual assault of a child under 14 (§ 269). On January 11, 2018, the trial court sentenced defendant to prison for two consecutive terms of 15 years to life. The court also ordered that defendant pay the following amounts: (1) a \$60 court operations assessment under former § 1465.8,² (2) a \$60 court facilities assessment (Gov. Code, § 70373), (3) a restitution fine of \$10,000 (§ 1202.4, subd. (b)), and (4) a suspended parole revocation restitution fine of \$10,000 (§ 1202.45). Defendant did not object to the imposition of these amounts at sentencing.

III. DISCUSSION

On appeal, defendant contends that, based on *Dueñas, supra*, 30 Cal.App.5th 1157, which was decided after he was sentenced in this case, the trial court violated his due process rights under the California and federal Constitutions by failing to make an ability-to-pay determination before imposing the fines and assessments. Defendant requests that the matter be remanded with directions to the trial court to determine his ability to pay and, if he does not have the ability to pay, then to stay the amounts. Defendant contends that, although he failed to object to the fines and assessments below, he did not forfeit his claim because: (1) the trial court failed to exercise its discretion to determine his ability to pay, (2) the imposition of fines and assessments without a determination of his ability to pay constitutes an unauthorized sentence that may be corrected at any time, (3) the deprivation of certain fundamental constitutional rights may be raised for the first time on appeal, (4) an objection at the time of sentencing regarding

² We observe that the current version of section 1465.8, which was in effect at the time of defendant's conviction, requires a \$40 court operations assessment for each conviction. (Stats. 2012, ch. 41, § 67, eff. June 27, 2012; *People v. Alford* (2007) 42 Cal.4th 749, 752, 759 [holding that the fee under former §1465.8 was not a punitive fine subject to ex post facto restrictions, and that the trial court properly imposed the fee in effect after the defendant committed his crime].)

his ability to pay would have been futile, and (5) there is not sufficient evidence of his ability to pay.

The Attorney General contends that defendant forfeited his claim, that the record does not establish an inability to pay, and that defendant fails to identify an adverse consequence that he will suffer from his alleged inability to pay the fines and assessments.

In *Dueñas*, the defendant at sentencing requested a hearing to determine her ability to pay various amounts that were imposed by the trial court. (*Dueñas, supra*, 30 Cal.App.5th at p. 1162.) At a subsequent ability-to-pay hearing regarding attorney's fees, the court reviewed the defendant's "uncontested declaration concerning her financial circumstances." (*Id.* at p. 1163.) The court waived attorney's fees based on the defendant's indigence but rejected her constitutional claim that due process required the court to consider her ability to pay other fines and assessments. (*Ibid.*)

On appeal, the appellate court held that under the California and federal Constitutions, "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164; see *id.* at p. 1168.) The appellate court further held regarding restitution fines that "although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Id.* at p. 1164.)

Questions have been raised regarding whether *Dueñas* was correctly decided. (See, e.g., *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1038 (*Gutierrez*) (conc. opn. of Benke, Acting P. J.) [analysis in *Dueñas* is incorrect and "fundamentally flawed"],

petn. for review pending, petn. filed July 15, 2019; *People v. Kopp* (July 31, 2019, D072464) ___Cal.App.5th___ [2019 Cal. App. Lexis 698, pp. *73, *76] [appellate court did “not reject *Dueñas* outright” but also was “not wholly endorsing” it].)

Moreover, unlike the defendant in *Dueñas*, defendant in this case did not object at sentencing to the imposition of fines and assessments or request an ability-to-pay hearing. The Courts of Appeal have reached conflicting conclusions regarding whether a due process claim under *Dueñas* is forfeited if the defendant failed to object in the trial court to the imposition of the fine, fee, or assessment. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [not forfeited]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 (*Frandsen*) [forfeited]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeited]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 [not forfeited]; *Gutierrez, supra*, 35 Cal.App.5th at p. 1033 [forfeited], petn. for review pending, petn. filed July 15, 2019; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1031-1034 [not forfeited], petn. for review pending, petn. filed July 31, 2019.)

We need not determine whether *Dueñas* was correctly decided. Based on the facts in this case, we determine that defendant forfeited his ability-to-pay claim, and that he otherwise failed to establish an inability to pay.³

³ It also appears from the record that defendant failed to comply with section 1237.2, which states: “An appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant’s request for correction. This section only applies in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on (continued)

First, the trial court imposed the maximum, statutorily authorized restitution fine of \$10,000 under section 1202.4. Section 1202.4 provides that “[t]he restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense.” (*Id.*, subd. (b)(1).) The statute sets forth a minimum and maximum fine. (*Ibid.*) Section 1202.4 further provides that “[t]he court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine.” (*Id.*, subd. (c).) However, “[i]nability to pay may be considered . . . in increasing the amount of the restitution fine in excess of the” statutory minimum fine. (*Ibid.*, italics added.) Specifically, in setting the restitution fine in excess of the statutory minimum, “the court shall consider any relevant factors, including, but not limited to, *the defendant’s inability to pay . . .*” (*Id.*, subd. (d), italics added.) The defendant “bear[s] the burden of demonstrating” an inability to pay. (*Ibid.*) “Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.” (*Ibid.*)

Significantly, “a defendant forfeits on appeal any ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ in the absence of objection below. [Citations.]” (*People v. Wall* (2017) 3 Cal.5th 1048, 1075.) In this case, by failing to object below, defendant forfeited his claim that the trial court failed to exercise its discretion to determine his ability to pay. (See *People v. Nelson* (2011) 51 Cal.4th 198, 227 [ability-to-pay claim forfeited where the defendant could have

appeal.” “The plain language of section 1237.2 clearly makes a claim to the trial court a prerequisite to any appeal which solely involves ‘an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs.’ [Citation.]” (*People v. Alexander* (2016) 6 Cal.App.5th 798, 801.)

objected at sentencing “if he believed inadequate consideration was being given to” the ability-to-pay factor for the restitution fine].)

Second, defendant’s claim on appeal does not fall within the narrow exception to the forfeiture rule for unauthorized sentences. An unauthorized sentence is one that “ ‘could not lawfully be imposed under any circumstance in the particular case’ [citation].” (*People v. Smith* (2001) 24 Cal.4th 849, 852.) The error must present a pure question of law that is “correctable without referring to factual findings in the record or remanding for further findings.” (*Ibid.*) In contrast, in this case, defendant seeks a remand to the trial court for further findings regarding his ability to pay the fines and assessments. (See *Frandsen, supra*, 33 Cal.App.5th at p. 1153 [inability-to-pay issue requires factual determination]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [rejecting the defendant’s contention that a \$10,000 restitution fine was an unauthorized sentence without an ability-to-pay determination, concluding that the claim was forfeited].)

Third, although defendant cites *People v. Vera* (1997) 15 Cal.4th 269 for the proposition that a party may raise “for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights” (*id.* at p. 276), “the dictum in *Vera* on which defendant relies ‘was not intended to provide defendants with an “end run” around the forfeiture rule,’ but was limited to a narrow class of constitutional rights” (*People v. Linton* (2013) 56 Cal.4th 1146, 1166). In this case, defendant fails to provide authority establishing that his specific due process claim falls within those “narrow class of . . . rights” that may be raised for the first time on appeal, such as “a plea of once in jeopardy and the right to jury trial.” (*People v. Tully* (2012) 54 Cal.4th 952, 980, fn. 9; see *People v. Partida* (2005) 37 Cal.4th 428, 437 [recognizing a “number of cases” in which the California Supreme Court “found a due process argument on appeal not cognizable when the defendant had not objected on due process grounds at trial”].)

Fourth, regarding defendant’s contention that an ability-to-pay objection at sentencing would have been futile, as we have set forth above, section 1202.4 requires

the trial court to consider a defendant's ability to pay in setting the restitution fine in excess of the statutory minimum. (§ 1202.4, subd. (d); see *id.*, subd. (c).) "Here, the trial court imposed the maximum restitution fine. [Defendant] was thus obligated to object to the amount of the fine and demonstrate his inability to pay anything more than the [statutory] minimum. Such an objection would not have been futile under governing law at the time of his sentencing hearing. [Citations.]" (*Frandsen, supra*, 33 Cal.App.5th at p. 1154.) In other words, "even before *Dueñas* a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay because governing law as reflected in the statute (§ 1202.4 . . .) expressly permitted such a challenge. [Citation.]" (*Gutierrez, supra*, 35 Cal.App.5th at p. 1033, petn. for review pending, petn. filed July 15, 2019.) "Thus, even if *Dueñas* was unforeseeable (a point on which we offer no opinion), under the facts of this case [defendant] forfeited any ability-to-pay argument regarding the restitution fine by failing to object." (*Ibid.*) We also determine that defendant forfeited his ability-to-pay claim regarding the \$60 court operations assessment and the \$60 court facilities assessment. "[I]f [defendant] chose not to object to a \$10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional [\$120] in fees." (*Ibid.*)

Lastly, regarding defendant's two-sentence argument that a substantial evidence claim is not forfeited on appeal, he fails to persuasively articulate, let alone establish, an inability to pay. As we set forth above, section 1202.4 provides that, in the trial court, the defendant "bear[s] the burden of demonstrating" an inability to pay the restitution fine. (§ 1202.4, subd. (d).) "The statute thus impliedly presumes a defendant has the ability to pay and expressly places the burden on a defendant to prove lack of ability." (*People v. Romero* (1996) 43 Cal.App.4th 440, 449; see *People v. Miracle* (2018) 6 Cal.5th 318, 356 [a defendant on appeal is required to show an inability to pay the restitution fine].) On appeal, defendant admits that he "made no such showing" in the trial court regarding his

inability to pay the \$10,000 restitution fine. He also fails to persuasively argue an inability to pay the two \$60 assessments.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

People v. Gutierrez
H045606